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In the

Supreme Court of the United States

OCTOBER TERM, 1946

No.....

OSMOND Y. LADD and PAUL H. TODD,
Petitioners,
vs.
BARTHOLOMEW A. BRICKLEY, Trustee of
International Hydro Electric System,
SECURITIES & EXCHANGE COMMISSION, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Osmond Y. Ladd and Paul H. Todd pray that a writ of certiorari issue to review the judgment and decree of the United States Circuit Court of Appeals for the First Circuit entered in case file No. 4167 in said Circuit Court, on November 14, 1946 affirming the judgment of the United States District Court for the District of Massachusetts entered December 26, 1945.

OPINIONS BELOW

The District Court filed no opinion, findings of fact nor conclusions of law.

The opinion of the Circuit Court of Appeals was filed November 14, 1946, but is not yet reported. For the convenience of this Court, the Circuit Court's opinion is printed in an appendix hereto. Application for stay of mandate pending application in this Court for writ of certiorari was duly made and an order staying the mandate until December 30, 1946 was entered on November 25, 1946.

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended, being Section 347(a) of Title 28 of the United States Code.

STATEMENT OF MATTER INVOLVED

The general matter involved is the preservation of assets preceding final liquidation of International Hydro Electric System. This System (hereinafter called Hydro) is one of the more notorious utility holding companies, which were the occasion for enactment of the Public Utility Holding Company Act of 1935, 15 U. S. C. A. §§ 79-79z.

Hydro and its subsidiary New England Power Association, were the subject matter of Parts 31 and 32 of the Federal Trade Commission Study and Report underlying this legislation.

In more detailed particular, the specific matter involved in this petition is the approval by the two lower courts of a compromise settlement of all claims on behalf of

Hydro as a subsidiary company, against the present International Paper Company as the successor which had assumed all of the obligations of said subsidiary's former parent companies, International Paper & Power Company and former International Paper Company.

On July 21, 1942 the Federal Securities and Exchange Commission, (hereinafter called S. E. C.) ordered the dissolution of Hydro as a four tiered holding company contravening the standards of the Holding Company Act (R. 677-706).

On July 19, 1943 petitioner Osmond Y. Ladd commenced his derivative stockholder's suit in the Massachusetts Federal District Court on behalf of Hydro against International Paper Company for recovery upon Hydro's claims against its said former parent companies and shortly afterwards, Mrs. Janet M. Condon commenced her similar stockholder's suit in the Massachusetts State Court (R. 2, 200).

On August 12, 1943 the S. E. C. commenced its suit, likewise in the Massachusetts Federal District Court, to enforce the Hydro dissolution order. In addition to the usual statutory grounds for relief under the Holding Company Act, the Commission in its complaint, cited the pendency of said stockholders suits, and asked the District Court to investigate the merits of their underlying claims and take such steps as might be warranted (R. 192, *et seq.)*.

The District Court in due course appointed Mr. Bartholomew A. Brickley as Special Counsel to make this investigation (R. 261). Mr. Brickley devoted a year to the task and filed his exhaustive report recommending the continued prosecution of the litigation against Paper Company (R. 263). The District Court then appointed Mr. Brickley statutory trustee of Hydro under the Holding Company Act and directed suit accordingly (R. 306).

Mr. Brickley then commenced his Trustee's suit for Hydro, Civil Action 3280, in the said Federal District Court and a similar suit in Massachusetts State Court, claiming *inter alia*, damage recoveries exceeding $96,000,000 against the Paper Company (R. 485-513).

Later the District Court, on Mr. Brickley's petition approved a compromise settlement of all these cases and certain other Canadian claims against the Paper Company, in consideration of payment of $10,000,000 by latter to Hydro, together with the loan by Paper Company to Hydro's subsidiary Hudson River Power Corporation of the additional sum of $3,000,000 (R. 348).

At the settlement hearing, present petitioners submitted documentary evidence which together with other evidence secured by Mr. Brickley showed factual basis for Paper Company's liability and indicated a measure of recovery in Hydro's favor aggregating $131,859,059.56. The settlement constituted only 7½ per cent of such indicated recovery and was accepted by the Court under decree reciting merely:

> "that the compromise * * * is for the best interests of the estate * * * and the consideration * * * is fair, reasonable and adequate" (R. 348).

No findings or factual or legal analysis whatever, of a subsidiary nature were filed by the District Court on which its ultimate conclusion of fairness could be rationally predicated.

Petitioners Ladd and Todd (another stockholder and director of Hydro) appealed this settlement order to the United States Circuit Court of Appeals for the First Circuit, and upon affirmance there, now seek certiorari in this Court.

QUESTIONS PRESENTED

1. Whether the Court of Appeals is not in error in its decision that no findings of fact and conclusions of law were required of the District Court in support of its decision in this matter.

2. Whether the Court of Appeals decision is not erroneous in holding that the District Court had sufficiently complied with applicable requirements for finding of facts and conclusions of law in support of its decision approving this settlement.

3. Whether the District Court's order and decree approving this settlement should not have been reversed by the Court of Appeals and the case remanded for findings of fact and conclusions of law.

4. Or whether, in the alternative of reversal under Question 3, *supra*, the Court of Appeals, wholly independent of any reliance on special weight attaching to discretionary lower court rulings, should not have examined the record for itself and made its own specific findings of fact and conclusions of law, for the purpose of ascertaining in a general way the probable result of the full litigation of claims against the Paper Company.

5. Whether the Court of Appeals was not in error in failing to analyze correctly and adequately, the merits of Hydro's causes of action against the Paper Company together with the insufficiency of the several defenses thereto, all in the light of the relevant facts as shown by the record.

6. Whether the Court of Appeals was not in error in affirming the lower court on the assigned ground that no abuse of discretion had been shown on the part of the latter court in accepting the settlement.

7. Whether this settlement was not unfair and inadequate and should not have been rejected in view of the record showing below of substantial liability on the part of the Paper Company in Hydro's favor with potential measure of recovery thereunder, in the amount of $131,859,059.56.

REASONS FOR GRANTING THE WRIT

The Circuit Court of Appeals in this case has decided not less than three questions of general importance warranting the writ of certiorari herein, viz:

1. An important question of Federal law which has not been but should be settled by this Court.

2. Another important federal question in a way which is probably in conflict with the decisions of this Supreme Court.

3. Another important question in conflict with the decision of another Circuit Court of Appeals upon similar considerations.

Interconnected with these general questions is the further particular question, whether Hydro stockholders are not entitled to secure the rejection of an inadequate settlement of their derivative Hydro causes of action against the Paper Company. This question involves important principles of local law which petitioners believe have been decided in a way probably in conflict with such local law.

1. The important question of federal law which has not been, but should be settled by this Court concerns the Public Utility Holding Company Act of 1935, intended among other purposes to protect investors in the securities of such holding companies.

Under Section 11(a) and (b) of the Act, the S. E. C. is granted original authority to examine into and ascertain whether the structures of such companies satisfy the statutory standards, and if not, then to specify in particular cases, the type of action, simplification, reorganization or liquidation which shall be sufficient to meet the standards.

In order to carry out its orders, the S. E. C. is authorized under Section 11(d) of the Act, to:

> "apply to a (proper district) court (of the United States) * * * to enforce compliance with any order issued under subsection (b). In any such proceedings, the Court, as a *court of equity* may, to such extent as it deems necessary * * * take exclusive jurisdiction and possession of the company * * * and the Court shall have jurisdiction, in any such proceeding to appoint a trustee * * * to hold or administer under the direction of the Court, the assets so possessed * * * . In any such proceeding * * * the trustee with the approval of the Court shall have power to dispose of any and all of such assets and subject to such terms and conditions as the Court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which has been approved by the Commission."
>
> 15 U. S. C. A. § 79k(d).

A large extension of equitable jurisdiction is thus conferred upon federal district courts, involving the reconstruction of the affairs of some of the largest corporations in the country.

In the present case, the Court of Appeals has declared that the usual duties incumbent upon lower federal courts, to support their decisions with findings of fact and conclusions of law, are inapplicable to proceedings under the Holding Company Act.

But Rule 52(a) of the Rules of Civil Procedure provides:

> (a) In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct entry of the appropriate judgment.
>
> Rule 52(a) 28 U. S. C. A §§ 721-723 (West Publn. Edn.), p. 677.

However, the Court of Appeals held that the present matter and presumably any other decision of the District Court in Holding Company enforcement cases, do not constitute trials of issues on facts. Instead they are said to be administration proceedings under the Utility Holding Company Act, wherein as in the present case, Mr. Brickley is in a position similar to that of a receiver. That the provision of the Federal Rules applicable to such situations is not Rule 52(a), but rather Rule 66 concerning receivers.

Rule 66 last mentioned, provides that:

> "The practice in the administration of estates by receivers and by other similar officers appointed by the Court shall be in accordance with the practice heretofore followed in the Courts of the United States, or as provided in rules promulgated by the district courts, but all appeals in receivership proceedings are subject to these rules."
>
> Rule 66, 28 U. S. C. A. §§ 721-723 (West Publn. Edn.) P. 740.

Elsewhere in the Civil Rules, it is stated:

> "These rules govern the procedure in the district courts of the United States *in all suits of a civil nature* whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81."
>
> Rule 1, 28 U. S. C. A. §§ 721-723 (West Publn. Edn.) P. 371.

Rule 81 does not except the present type of suit nor actions generally under the Holding Company Act.

> Rule 81, 28 U. S. C. A. §§ 721-723 (West Publn. Edn.) p. 769.

And in the practice followed in courts of the United States prior to adoption of the Civil Rules, findings of fact and conclusions of law were always required in equity suits, without exception even for receiverships. Thus it is provided in former Equity Rule 70½ viz:

> "In deciding suits in equity * * * the Court of first instance shall find the facts specially and state separately its conclusions of law thereon."
>
> 28 U. S. C. § 721-723 (West Publn. Edn.) p. 816.

Prior to Rule 70½, and generally with respect to interlocutory orders as well, findings of fact and conclusions of law were always required in all equity proceedings.

> *Railroad Comm'n. v. Maxcy*, 281 U. S. 82;
> *Public Service Comm'n. v. Wisconsin Co.*, 289 U. S. 67.

If the decision below remains undisturbed, then litigants in S. E. C. enforcement cases under the Holding Company Act, will be deprived of the fair and intelligent review of lower court judgments, which findings of fact and conclusions of law were designed to assure.

This Court has repeatedly emphasized the necessity for specific findings and conclusions by courts of first instance, in all appealable equity rulings. The purpose of such findings, etc., was to make certain that appellate courts be informed as to the nature of issues decided and especially upon the point whether the lower court had acted upon its own view of determinative questions of law reviewable on appeal, or upon a permissible discretion in relation to matters of fact or expediency.

Public Service Comm. v. Wisconsin Co., 289 U. S. 67;
Railroad Comm. v. Maxcy, 281 U. S. 82;
Mayo v. Lakeland Co., 309 U. S. 310;
Panama Mail S. S. Co. v. Vargas, 281 U. S. 670;
Kelley v. Everglades District, 319 U. S. 415.

and see—

Sparks v. Melwood Dairy, 74 Fed. 2nd (C. C. A. 6) 695.

2. The second important federal question above noted, which has been decided in a way probably in conflict with applicable decisions of this court, relates to the sufficiency of the findings by the district court, assuming findings of fact and conclusions of law to be necessary.

The District Court's only findings in this case were those contained in its final decree stating:

> "That the Court hereby determines that the compromise provided for * * * is for the best interests of the estate of said System (Hydro) * * * that the consideration * * * is fair, reasonable and adequate" (R. 348).

The Court of Appeals held this finding, in the nature of ultimate facts, to be sufficient, and entirely overlooked the contrary decisions of this Court upon the precise point.

In a municipal bankruptcy proceeding reaching this Court, the lower court had confirmed a composition plan upon conclusions contained in the decree, that the plan was:

> "fair, equitable and for the best interests of the creditors and does not discriminate unfairly in favor of any creditor or class of creditors."

On review the Supreme Court held that this statement was not a sufficient compliance with the requirement for findings of fact and conclusions of law. To the contrary the lower court should have made a reasoned estimate of probable future revenues available for the satisfaction of creditors and a determination of the extent to which each class was entitled to share in particular sources. This Court said:

> "To support such determinations there must be findings in such detail, and exactness, *as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can be rationally predicated.*"
>
> *Kelley v. Everglades District,* 319 U. S. 415 at 420.

The subsidiary facts and issues, on basis of which the instant controversy should have been weighed, include probable validity of Hydro's claims against the Paper Company; the apparent difficulties likely to attend enforcement of the same in court; the prospects of collectibility of judgment, if obtained; the relative importance of delay; the comparison of amounts of settlement with the prospects of full recovery; and lastly the wishes of parties in interest.

> *MacDonald v. Aetna Indemnity Co.,* 88 Conn. 571;
> *In re Ortiz Estate,* 27 A. 2nd, (Del. Ch.) 368;
> *Gordon v. Hartford Sterling Co.,* 319 Pa. St. 174.

Upon the above mentioned six considerations and each of them, the district court should have made a reasoned analysis and findings upon the relevant facts as disclosed in the record, not to the end, of reaching a decision which actually binds the Paper Company, but rather to the end of estimating soundly, the probable results of the litigation

if carried to conclusion. See the cases last enumerated in the preceding paragraph hereof.

The Court is required to make its own decision and analysis of the settlement's acceptability. He may not merely accept the opinion of "eminent counsel" as indicated by the Court of Appeals.

Cohen v. Young, 127 Fed. 2nd (C. C. A. 6) 721.

Incidentally, one of the firms of eminent counsel as mentioned by the Appellate Court, Rope, Gray, Best, Coolidge and Rugg, was counsel for the Paper Company at the very same time when the firm undertook to advise Hydro not to bring suit against the Paper Company. This firm had been attorneys for the Paper Company since prior to 1928 and had acted throughout the intervening period as Massachusetts counsel for the Paper Company (R. 272, 273; also see Exhibit F of the unprinted portion of record, pages 9-11).

The other eminent counsel Mr. R. G. Dodge who advised against suit was not furnished the full facts. After Mr. Brickley had examined these opinions in full, he concluded contrary to their advice (R. 263, 294).

The fact that such decision and estimate by the Court will not result in a final determination as against Paper Company on the merits, does not obviate the necessity for any findings whatever. Instead, as in decisions upon interlocutory injunctions, the duty of the Court is to make such findings and conclusions as the nature of the case permits.

> "While an application for an interlocutory injunction does not involve a final determination of the merits it does involve the exercise of sound judicial discretion. That discretion can be exercised only upon the determination in the light of the issues

> and facts presented, whether the complainant has made or failed to make such showing * * * as to warrant interlocutory relief * * *. The result of the Court's inquiry into the issues and into the facts presented * * * in order to satisfy itself * * * should be set forth by the Court in a statement of facts and law constituting the grounds of its decision. *While that decision is not on the merits and does not require findings of fact and conclusions of law which would be appropriate on final hearing, the Court should make the findings of fact and conclusions of law that are appropriate to the interlocutory proceeding.*"
>
> *Public Service Comm. v. Wisconsin Co.*, 289 U. S. 67 at 70, 71.

In the face of these cases, and especially the decision in the *Kelley v. Everglades* case, *supra*, the instant Court of Appeals held that the district courts recital of fairness of compromise was sufficient. The Appellate Court said:

> "These are findings of fact. They are ultimate facts, truly, and represent a judgment based upon the consideration of all the imponderables involved in determining whether the proposed offer met the requirements of being fair, reasonable and adequate. We do not see what more could be asked for. Certainly the Court was not required to put its guess as to the probable success of each claim and defense into a formally stated conclusion" (R. 1735).

3. The third important question above noted, the one which was decided in probable conflict with the decision of another Circuit Court of Appeals, concerns the relative right of junior security holders of Hydro to their insistence upon further prosecuting the Paper Company litigation, when the acceptance of the settlement will probably suffice to pay off the preferred claims of the senior securities in Hydro's system.

Present Petitioners are the owners of quantities of Class A stock, the junior security of Hydro now outstanding.

The capital contribution to Hydro which was secured from the original sales of the Class A stock exceeded $32,485,000, mostly at cost prices of $43 a share and upwards (R. 274, 276 and Ex. 1, Fed. Trade Commn. Report 1030).

The record does not contain a break down of values of Hydro's underlying assets, showing liquidation values applicable to Class A stock on the basis the $10,000,000 settlement recovery. But market values for the Class A stock on trading exchanges, at $11 to $12 a share, indicate a large loss on the original investment in this security in the event this settlement is finally accepted (R. 383). How much liquidating value, if any, will finally appear for the Class A stock is problematical. For instance at the time of hearing in the Court below considerable question existed as to whether Hydro could successfully refinance its debt on the 1932 Water Powers, and upon what terms (R. 1243-1245).

The outstanding securities of Hydro, Present Company, now comprise the following:

6% debentures principal	$26,568,000
$3.50 preferred stock, aggregate par value and accumulated dividends to 12/31/45..	12,866,785
Class A stock on basis original investment, in excess of	32,485,000

(R. 274, 276, 729, 730)

The debentures have first priority for payment in full, and the preferred stock has second priority for payment in full, all before distributions in liquidation can be made on the Class A shares.

The Circuit Court of Appeals indicated that the interests of the Class A stock were at most of subordinate concern in the evaluation of the settlement from the point of view of protection of the senior security holders. The Court said:

> "We do not know how well off the debenture holders will be if $10,000,000 is added to Hydro's assets. It is clear, of course, that they will benefit before the A stockholders do. It is equally clear that to the extent that the A stockholders can embark the corporate enterprise on long and expensive litigation, they will have a run for other people's money, the result of which, if rosy hopes are realized, will be a profit to them. But the risk will be on the holders of the senior securities. This element * * * is not conclusive, but is one of the items which may be properly considered" (R. 1726, 7).

In thus restricting the Class A rights to have their legitimate claims fully explored and litigated, for fear of injuring senior securities, the Appeals Court took a position exactly opposite to that of the Fourth Circuit Court of Appeals in the Central States Electric case.

In this latter case, the district court in reorganization proceedings had refused to allow investigation of claims of the corporation against Harrison Williams, former controlling stockholder, for misappropriation of the corporation's assets. The court believed that the conservation of assets for benefit of senior security holders precluded the expense of such investigation, but the Fourth Circuit held otherwise, stating:

> "We think it clear that in refusing to order the further investigation which the record here so clearly called for, the District Judge was not exercising the discretion vested in him *but was proceeding on the erroneous assumption* that he had no dis-

> cretion to order a further investigation in view of what he conceived to be the right of the debenture holders with respect to the funds in the hands of the trustees. * * * We think that * * * the facts so clearly call for further investigation and action that the order appealed from should be reversed."
>
> *In re Central States Electric Corp.*, 143 Fed. 2nd (C. C. A. 4) 684.

In our present case we have had the equivalent investigation by Mr. Brickley and the S.E.C. which the Fourth Circuit ordered in the Central States case. The report of our investigation indicated a good cause of action (R. 263-294) on Hydro's behalf against the Paper Company.

The same reasoning which gave the junior security holders in Central States the right to their investigation, gives Hydro Class A stockholders the right to have litigated their good cause of action on Hydro's behalf—without abatement for an unsatisfactory settlement which only protects senior security holders.

In conclusion it may be added that the Court of Appeals in the instant case did not attempt thoroughly to analyze either the probable merits of Hydro's claims against the Paper Company nor the defenses thereto. Several of the defenses were mentioned with comment that interesting and difficult questions were involved. Actually upon the record, the facts when carefully analyzed did not sustain the defenses. For instance the defense of Paper Company's immunity to suit in the State of Massachusetts, had already been twice decided adversely to Paper Company in these very proceedings, once by Judge Healey in the Ladd case (R. 48-59) and again by Judge Beaudreau of the Massachusetts Superior Court in Mr. Brickley's case in that forum (R. 358).

Judge Beaudreau granted Paper Company's motion to report his decision to the Massachusetts Supreme Court (R. 358). But the law of the point was not doubtful as this Court can verify by examining Judge Healey's opinion at R. 49.

Instead of reaching its own conclusions on the controlling factors of the settlement matter, the Court of Appeals reviewed the case for abuse of discretion *only*.

The reviewing court assigned to the district court's decision, the special weight attaching to discretionary rulings. But the fact is that no specific findings and conclusions by the lower court were contained in the record whereby it could be *known* whether any discretionary rulings were involved in the lower court's decision.

It is therefore respectfully submitted that the requested writ should issue to the United States Circuit Court of Appeals for the First Circuit directing that court to certify and send to this Court a full and complete transcript of the record in said case therein entitled Osmond Y. Ladd and Paul H. Todd, Appellants v. Bartholomew A. Brickley, Trustee of International Hydro Electric System, Securities & Exchange Commission, et al., Appellees, Consolidated Cause No. 4167, to the end that the same be reviewed and determined by this Court, and that your petitioners may have such other relief as this Court deems appropriate.

HOWELL VAN AUKEN,
Attorney for Osmond Y. Ladd and Paul H. Todd, Petitioners,
1603 Ford Building,
Detroit 26, Michigan.

In the

Supreme Court of the United States

OCTOBER TERM, 1946

No.....

OSMOND Y. LADD and PAUL H. TODD,
Petitioners,
vs.
BARTHOLOMEW A. BRICKLEY, Trustee of
International Hydro Electric System,
SECURITIES & EXCHANGE COMMISSION, et al.,
Respondents

BRIEF ON BEHALF OF OSMOND Y. LADD AND PAUL H. TODD IN SUPPORT OF APPLICATION FOR CERTIORARI

As stated in the attached petition for certiorari, International Hydro Electric System, organized in the 1920 decade, was one of the public utility holding companies whose structures and financial practices prompted the enactment of the Public Utility Holding Company Act of 1935.

Hydro, as this company will be hereinafter designated, was created by International Paper & Power Company as the promoter and parent company owning voting control of Hydro (R. 65, 67).

The greater part of Hydro's original cash capital, more than $48,000,000 (R. 51, 53) was derived from sale to the public of $30,000,000 of debentures and 475,000 shares of Class A stock.

International Paper & Power Company and its immediate subsidiary, former International Paper Company, acquired, at Hydro's inception, all of latter's Class B and comomn stock not publicly offered, and thus secured voting control of Hydro which they retained until at least as late as January 31, 1939 (R. 67, 275, 1029). On this date Paper Companies turned over all of said Class B and common stock to a group of three trustees, and the latter on June 16, 1941, pursuant to Securities and Exchange Commission order of January 17, 1941 (8 S. E. C. 485) surrendered said stock for concellation (R. 1030, 212). Hydro's Class A stock was then left as the outstanding junior security issue.

On July 21, 1942, the Securities and Exchange Commission, hereinafter called S. E. C., ordered Hydro's dissolution as a holding company contravening the standards of the Holding Company Act (R. 209, 238).

Following the dissolution order Osmond Y. Ladd as a stockholder of Hydro, commenced his derivative stockholder's suit in the Massachusetts Federal District Court, on behalf of Hydro, against present International Paper Company, to recover upon Hydro's claims against its said former parent companies, International Paper & Power Company and former International Paper Company (R. 2). Present Paper Company had assumed the obligations

of the two latter (R. 61). And shortly afterwards another Hydro stockholder, Mrs. Janet M. Condon, commenced her similar stockholder's suit in the Massachusetts State Court (R. 200).

Thereafter on August 12, 1943, the S. E. C. commenced its suit in the Massachusetts Federal District Court, to enforce the Hydro dissolution order. In addition to the usual statutory grounds for relief under the Holding Company Act, the Commission in its complaint stated the pendency of said stockholders suits, and asked the District Court to investigate the merits of their underlying claims and take such steps as might be warranted (R. 192, 200).

The District Court then appointed Mr. Bartholomew A. Brickley, special counsel to make this investigation (R. 261). After the filing of his thorough report recommending continuance of the litigation against the Paper Company (R. 263), the District Court next appointed Mr. Brickley statutory trustee of Hydro, and directed suit accordingly (R. 306).

Mr. Brickley then commenced his Trustee's suit for Hydro against Paper Company, Civil Action 3280 in said Federal District Court, and a similar suit in the Massachusetts State Court, claiming *inter alia*, damages exceeding $96,000,000 in behalf of Hydro (R. 485, 516). Later all these suits, Ladd, Condon and Brickley were compromised and settled pursuant to the District Court's approval of Mr. Brickley's petition in that behalf, for the consideration of $10,000,000 to be paid by Paper Company to Hydro, together with the loan by Paper Company to Hydro's subsidiary, Hudson River Power Corporation, of an additional $3,000,000 (R. 348).

Present petitioners deeming the settlement wholly inadequate, appealed therefrom to the United States Circuit Court of Appeals for the First Circuit where the settlement order was affirmed. Hence this petition for certiorari.

REFERENCE TO THE REPORTED OPINIONS

The District Court filed no opinion, findings of fact or conclusions of law, but entered only, the final judgment or decree printed in the record at page 348, and not reported.

The opinion of the Court of Appeals has not yet been finally reported, but copy is attached in the appendix hereof.

BASIS OF JURISDICTION

Jurisdiction is invoked under section 240(a) of the Judicial Code as amended, being section 347(a) of Title 28 of the United States Code.

SPECIFICATION OF ERRORS

(1) The Court of Appeals erred in its decision that no findings of fact and conclusions of law were required by the District Court in support of latter's decision in this matter.

(2) The Court of Appeals erred in its holding that the District Court had sufficiently complied with applicable requirements for findings of fact and conclusions of law in support of its decision approving this settlement.

(3) The District Court erred in its failure to reverse the District Court's order approving settlement and then

remand the case for findings of fact and conclusions of law.

(4) In the alternative of reversal under Specification (3) *supra,* the Court of Appeals erred in its failure, wholly independent of reliance upon special weight attaching to presumed discretionary rulings below, to examine the record for itself and make its own specific findings of fact and conclusions of law for the purpose of ascertaining in a general way, the probable result of the full litigation of claims against the Paper Company.

(5) The Court of Appeals erred in failing to analyze correctly and adequately the probable merits of Hydro's causes of action against the Paper Company, together with the probable insufficiency of the several defenses thereto all in light of the relevant facts as shown by the record.

(6) The Court of Appeals erred in affirming the lower court on the assigned ground that no abuse of discretion had been shown on the part of the latter court in accepting the settlement.

(7) The Court of Appeals erred in its failure to find and determine that the settlement in question was unfair, inadequate and unreasonable in view of the record showing of substantial liability on the part of Paper Company in Hydro's favor with a potential measure of recovery therein in the amount of $131,859,059.56.

STATEMENT OF THE CASE

The claims sought to be asserted in Hydro's favor against the Paper Company comprise rescission, or in the alternative, recovery of damages with respect to Hydro's purchase of two principal investments from the Paper Companies, viz.:

(1) An aggregate of 821,779 shares of New England Power Association (NEPA) common stock at a cost of $62,998,122.69;

(2) A group of water power properties purchased by Hydro in 1932 at a cost of $31,797,610.39, these water powers being taken in the form of securities—stock and debt of companies then made subsidiary to Hydro.

This second group of securities will be frequently designated herein as "1932 water powers."

At the inception of Hydro, Paper Companies immediately designated the personnel of Hydro's board of directors, comprising Archibald R. Graustein, president of Paper Companies, and Samuel C. Moore and Carl S. Hermann, two of the officers of NEPA (R. 549, 66, and Federal Trade Commission Report 448). The Trade Commission Report, hereinafter designated FTCR, was received in evidence as Exhibit 1 and together with several other Exhibits, was not printed in the Record. However under Court order at R. 1707-1709 same may nevertheless be referred to in argument, these unprinted exhibits having been returned to this Court along with the printed record.

With this Hydro board of directors installed, Paper Companies then "*caused*" Hydro to purchase the two

greater blocks of NEPA stock included in said first mentioned aggregate, namely, blocks of 378,030 shares and 398,763 shares respectively, all in accordance with the previous written agreement made by International Paper & Power Company (hereinafter called IPP) with latter's stock underwriters (pp. 2 and 3, Ex. B contained in unprinted Ex. 3A).

The remaining shares of said NEPA stock aggregate were purchased in the several succeeding months from Paper Companies or their nominees, all at an average cost for the entire aggregate, of $76.66 per share (R. 553, 554, FTCR 1035).

The NEPA purchase was largely financed through utilization of the $48,000,000 cash capital funds raised as above stated, from the general public. This cost was far in excess of reasonable values of the stock as abundantly shown in the record below. See Brickley finding, R. 272.

Thus on the books of NEPA said shares carried a value of only $55 as of December 31, 1928, and $57.69 as of December 31, 1929 (FTCR pp. 683 and 697).

NEPA book value in turn was excessive, because it reflected extensive writeups of underlying properties above original costs. Selection of just a few of these writeups as disclosed in the FTCR, and deduction of same from the NEPA balance sheets shows book value of NEPA common at $25 per share on December 1, 1928, and $29.62 per share in 1929 (FTCR, 617, 636, 494, 261-267, 932, 85, 89, 268, 275, 847, 320).

Earnings for NEPA for the four years of its existence prior to and including the year of Hydro's acquisition, viz., 1926 to 1929, were only $2.22, $2.15, $2.77 and $2.33 per share each year respectively (FTCR 715, 683).

Four year average earnings were only $2.37. At 15 times earnings, according to Mr. John J. Raskob's famous formula then current, the valuation of NEPA stock would only be $35.55 per share.

NEPA dividends in this period and subsequent, were only 37½¢ per share in 1926, $1.62½ in 1927 and $2.00 a year thereafter until the year 1934 when 75¢ per share only was paid, and dividends then stopped and never afterwards resumed. (FTCR 695; R. 965, 1023 and 222).

NEPA's earnings on corporate basis applicable to common stock for the 15 years period 1926 to 1940 averaged only $1.70 per share (R. 1064). NEPA's consolidated earnings over the ten year period, 1934 to 1943, as applicable to common stock averaged only $1.10 per share (Unprinted Ex. K., p. 23).

Actually Hydro has received no return from this $62,998,122.69 investment since 1934, and while small irregular earnings were shown on the stock, same could not be distributed. Even the preferred dividends were falling into arrears (Unprinted Ex. J, p. 22).

The S. E. C. in its order for dissolution of Hydro noted this absence of income from an investment representing 73.5% of the carrying value of Hydro portfolio, and stated:

> "When a holding company in the position of IHES (Hydro) having high fixed charges and preferred dividend requirements, fails to obtain a return for such a long period of time from an item constituting a preponderant part of its total investment portfolio, it is inevitable that serious financial difficulties result" (R. 222).

With respect to funds for the purchase of the 1932 water powers, Hydro sold an additional block of 265,000 shares

of its Class A stock to the public, in September, 1929, realizing additional capital in the amount of $12,985,000 therefrom (R. 276).

Shortly afterwards Paper Companies, pressed for money and without Hydro directors' approval, borrowed substantially all of Hydro's available cash and finally accumulated an obligation in Hydro's favor in the amount of $15,200,000 as of December 31, 1931 (R. 278).

For the purpose of repaying this obligation Paper Companies sold the 1932 water powers to Hydro by a vote of Hydro's board of directors comprising for the most part, individuals who were simultaneously officers, stockholders or directors of the Paper Companies or of their other subsidiaries.

Without detailing all the circumstances leading up to the transaction, Hydro's board of directors on June 23, 1931 voted to purchase these water powers for a price of $37,706,700 (R. 287).

This vote was taken on the recommendation of a two man special directors' committee including Samuel C. Moore, director of Hydro, who was also a secretary of IPP. Of the directors present and voting to purchase, at least eight of ten were subject to disqualifications preventing their vote on matters affecting the Paper Companies, viz:

Mr. Moore was Secretary of IPP (R. 284);

Mr. Weeks was an officer of Harris, Forbes & Co. and Chase, Harris, Forbes Corporation, both large stockholders of IPP through Public Utility Holding Corporation; also their affiliate Chase National Bank was a large stockholder of IPP (FTCR 968-970 and unprinted Ex. F pp. 16, 12), and was also a creditor

of Paper Companies then actively competing with Hydro for payment of its claims (Ex. F., pp. 9, 12, 16-18; R. 1707, 1709);

Mr. Lowell was a partner in Lee, Higginson Co., large stockholder of IPP (Ex. F, p. 15);

Messrs. Peters and Weed were director and vice-president respectively, of First National Bank of Boston, a large creditor of the Paper Companies also actively competing in this very matter with Hydro for payment of its claims (Ex. F, pp. 15, 16; also R. 291);

Mr. Coolidge was the New England Attorney for Paper Companies and former Secretary of IPP (R. 272, 273);

Messrs. Drury and Gale were directors of Paper Companies' Canadian subsidiaries CIP and Hull Electric Railways (R. 285).

Thereafter one of the directors, Mr. Childs, objected to the purchase and Paper Company subsequently reduced its price somewhat. On March 7, 1932 the directors voted again to purchase, this time for $31,797,610.39 (R. 288-290). On this occasion at least five out of seven of the directors voting on the proposal were disqualified, namely, Messrs. Coolidge, Lowell, Peters, Weed and Weeks, whose adverse affiliations have just been noted.

When purchasing these powers, Hydro's officers failed to secure requisite approval of the transaction from the New York Public Service Commission. The purchase price was paid in part by the allowances of credits against Paper Companies' debt to Hydro and the balance of price by Hydro's assumption of $16,995,000 of underlying debt against the properties. On one occasion when proceedings were later taken before the New York Commission for per-

mission to extend or refund this underlying debt, the Commission denied permission and called attention to the fact that its jurisdiction had been originally ignored when the properties were purchased. Also the Commission characterized the excessive value paid for the properties as follows:

> "At the time of the acquisition of these power properties by the (Hydro subsidiaries) SPI and HRPC neither of these corporations recognized the jurisdiction of the Commission. * * *
>
> The refunding difficulty of the present companies is the result of the price they paid in 1932 for water rights, without sanction of any public authority. It would certainly be contrary to this Commission's duty and to the law if the Commission should now prejudice the interest of future power consumers in order to help the companies out of their financial difficulty.
>
> It must not be forgotten that these water rights, which the company proposes to use for future hydroelectric developments, constitute a natural resource to the value of which the present and prior owners have made no contribution except in the comparatively small matter of storage reservoir assessments. The company's plan, however, is eventually (after redevelopment) to sell electric power at a price much higher than necessary merely to cover the development cost—the additional profit to cover return on the alleged value of the water rights. These alleged values (entirely aside from construction costs) are in the neighborhood of $150 per kw of proposed generating capacity. If the Commission were to approve a security issue on this basis, it would be construed to be the indorser, if not the guarantor of such profits. None of the evidence explains how such an act would serve the public interest and comply with the law" (R. 1171, 1191).

The record also shows that the cost of the properties to Hydro largely exceeded Paper Companies' then depreciated carrying value on their own books, which latter figure was only $19,748,701.48 (See unprinted Ex. F, p. 1). Paper Company admits a profit at R. 561. The New York Commission in its later studies of these properties, found additional depreciation chargeable thereto as of December 31, 1931, to which Hydro agreed in the amount of $1,266,991 (R. 986, 1002, 1003). Thus Paper Companies' true depreciated book value as of purchase date, was only $18,481,711 at most. At Hydro's cost, Paper Company's profit in the transaction was actually $13,315,899.39, and this in the depth of the depression. The record is replete with further factual material showing the inadequate value of these investments as compared with the purchase price which Hydro was required to pay, and also showing the resulant injury to Hydro and Class A stockholders, and the overreaching of Hydro by the Paper Companies.

The above is just a rough outline showing the general nature of the case which will be further amplified in briefs in regular course after certiorari shall have been granted.

During the interim of the S. E. C. proceedings for dissolution of Hydro, similar S. E. C. proceedings were likewise taken for the simplification of NEPA as a holding company contravening the standards of the Holding Company Act (Unprinted Ex. J., R. 1707).

In the course of these latter proceedings, hearings were held on a plan contemplating the elimination of all NEPA's intermediate holding companies and the substitution of a single holding company directly owning the stocks of all NEPA operating companies.

This first NEPA plan provided for capital structure including debt, preferred and common stock. But this

was abandoned on objection of the Utility Division of the Commission after hearing. Thereafter an amended plan was filed specifying the new company's capital as $85,000,000 of debt, and 6,695,075 common shares, with *no* preferred stock (Unprinted Ex. L, also see R. 1708-9).

Under this new plan the old NEPA common stock is to be exchanged for new company common stock in the ratio of one share of old for 65/100ths of one share of new common. Thus Hydro for its 821,799 NEPA shares—88% control—will receive 534,169 new shares, or less than 8% interest in the new company (Ex. L, p. 9).

On March 14, 1946, about three months after the entry of the District Court's acceptance of the presently controverted settlement, the Commission approved this amended plan in substance, of which this Court may take judicial notice.

> *American Legion Post v. First Natl. Bank,* 113 Fed. (2) 868;
> *Tempel v. United States,* 248 U. S. 121 at 130.

During the course of the extended hearings on the NEPA simplification, the market appraised the prospects for the old NEPA common stock, in light of the probable reorganization. The record herein shows the high price in recent years for the NEPA old common at $12 a share as reached at the date immediately preceding settlement hearing in District Court (R. 432). Previously NEPA common has sold as low as 62½¢ per share on January 4, 1943 (R. 927).

At the $12 price Hydro's NEPA investment was worth only $9,861,588 at the settlement date, against cost of $62,998,122.69—a loss of $53,136,534.69 besides the loss of all income since the year 1934.

During Hydro's ownership of the NEPA common stock its dividend receipts aggregated only $8,301,000 over the entire period the same being received in years 1929-34 (R. 420).

With respect to the water powers, the record discloses that the true earning capacity of Hydro's interest in the four New York corporations owning the powers, has been small indeed over the twelve year period 1932-1943—only 3.97% per year average, or 3.65% when benefit of consolidated income tax returns with Hydro is eliminated (R. 958).

The record also shows that Hydro in its endeavor to refinance the assumed debt upon these properties, is being required to make drastic write-downs to amortize excessive costs originally paid for the properties. The final amount of this write-down had not been established at the date of settlement hearing in District Court. But these amounts were running in excess of $8,766,991 as indicated at R. 987. They are now confirmed at considerably more, see S. E. C. Holding Co. Act Release No. 7042, December 5, 1946, of which this court can take judicial notice.

So there is no question about the fact that the detriment to Hydro from purchase of these water powers has been of substantial magnitude.

The measure of recovery in this case for Hydro's losses on these various investments can be computed as follows:

On the NEPA investment Hydro is not confined to the difference between cost and value at time of purchase. But under such decisions as *Spiegel v. Beacon Participations, Inc.*, 297 Mass. 398; *Parker v. Nickerson*, 137 Mass. 487; *Medford Trust Co. v. McKnight*, 292 Mass. 1; *Prudential Ins. Co. v. McCarter*, 271 Mass. 132; *Hotaling v.*

Leach, 247 New York 84; *Singleton v. Harriman,* 152 Misc. (N. Y.) 323, affirmed 241 App. Div. 857, Hydro is entitled to recover consequential damages, resulting from continued holding of the investment and resultant decline to this date. Hydro's recovery on the NEPA investment including Massachusetts 6% interest rate, would thus calculate:

Investment cost		$ 62,998,122.69
Interest from est. average purchase date 12-31-29 to 12-31-45, 16 yrs. @ 6%		60,478,270.00
Total cost and interest		$123,476,392.69
Deduct salvage—		
Dividend receipts to mid-year 1934 (R. 420)	$8,301,000	
Interest on same from 1-1-32 est. average date of receipt @ 6%	6,972,000	
Present value NEPA Common at $12.00 per share	9,861,588	
Total salvage deduction		25,134,588.00
Balance net recovery on NEPA		$ 98,341,804.69

On the water powers Hydro is entitled under the Massachusetts case of *Fardy v. Buckley,* 231 Mass. 377, to recover Paper Company's profits in the transaction, represented as the difference between Hydro's cost and Paper Company's true depreciated book value. Also under the Federal authorities, including the Federal Water Power Act, the true value of these properties, measured at the legally required carrying values binding upon Hydro, can only be considered as Paper Company's own original cost.

United States v. Appalachian Elec. Power Co., 85 L. Ed. 243 at 259 and 261 *et seq.*;

Pennsylvania Water, etc. Co. v. Federal Power Commission, 123 Fed. (2d) (App. D. C.) 155, 163; certioarari denied 86 L. Ed. 1205;

Oklahoma v. Atkinson, 85 L. Ed. (June 1941) 1487 at 1499;

Louisville Gas & Elec. Co. v. Federal Power Commission, 129 Fed. (2d) (C. A. A. 6) 126 at 130; certiorari denied 87 L. Ed. 1133, 1164.

That the underlying depreciated cost as of date of Paper Company's sale to Hydro was the proper cost for the properties, binding upon Hydro, see

Niagara Falls Power Co. v. Federal Power Commission, 137 Fed. (2d) (C. C. A. 2) 787; cert. den. 88 L. Ed. 477 and 492.

See also,

Federal Power Commission opinion, re Niagara Falls Power, 44 P. U. R. (N. S.) 291.

Thus the measure of damage recovery on the water powers transaction, on basis of the ordinary rule, difference between cost and value at purchase date, is $13,315,899.39 plus 6% interest in Massachusetts, $11,185,355.48, or a total of $24,501,254.87.

In short summary, all of these investments in NEPA stock and 1932 water powers were acquired by Hydro from its parent companies under pressure of parent companies' domination and control. This fact is succinctly expressed in a brief of Utilities Division of the S. E. C. at R. 975 where the Commission was speaking particularly of the water power purchases. However, the same conclusions are applicable also to the NEPA investment. Thus the Commission stated:

"With all due respect to the gentlemen who made up the Board and who made up the purchase committee, the fact cannot be overlooked that the voting control of Hydro was held by the International Paper Company interests. • • • To call the purchase of these assets anything other than a transaction between affiliates and one not at arm's length would be to close one's eyes to the realities of the situation. We reiterate that the transaction had to be consummated, and consummated on terms satisfactory to the International Paper Company interests" (R. 975).

ARGUMENT

I.

In cases where the relation of parent and subsidiary companies is shown, it is well established that the burden of defending the fairness of challenged transactions between the parent and subsidiary rests upon the parent. To sustain this burden the parent must show the complete fairness of the transactions and adequacy of consideration, from the subsidiary's point of view. Unless the parent can sustain this burden the subsidiary is entitled to full compensatory relief.

> "Their (controlling stockholders') dealings with the (subsidiary) corporation are subjected to rigorous scrutiny, and where any of their contracts or engagements with the (subsidiary) corporation is challenged, the burden is on the * * * (controlling) stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the view point of the (subsidiary) corporation and those interested therein. * * * The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. *If it does not, equity will set it aside.*"
>
> *Pepper v. Litton,* 308 U. S. 295 at 306; 84 L. Ed. 281 at 289.

See also,

May v. Midwest Refining Co., 121 Fed. (2d) (C. C. A. 1) 431;

United Hotels Co. v. Mealey, 147 Fed. (2d) (C. C. A. 2) 816;

Pennsylvania Canal Co. v. Brown, 235 Fed. (C. C. A. 3) 669 at 684; cert. den. 242 U. S. 646;

Ross v. Quinnesec Co., 227 Fed. (C. C. A. 6) 337;
Hyams v. Calumet & Hecla Co., 221 Fed. (C. C. A. 6) 529 at 537;
Geddes v. Anaconda Co., 254 U. S. 590 at 599;
Lebold v. Inland Steel Co., 125 Fed. (2d) 369 at 373; cert. den. 86 L. Ed. 1749, 316 U. S. 675;
Consolidated Co. v. Dubois, 312 U. S. 510, 522; 85 L. Ed. 982 at 991.

Massachusetts decisions are in entire accord, viz:

Buckman v. Elm Hill Realty Co., 312 Mass. 10;
Lazenby v. Henderson, 241 Mass. 177;
Old Dominion Copper Co. v. Bigelow, 203 Mass. 159 at 178.

Furthermore the directors of a corporation cannot represent it in transactions with another corporation of which latter they are stockholders, officers, directors, agents or attorneys.

From the Massachusetts Spiegel-Beacon Participations case:

> "The directors of an ordinary business corporation * * * are bound to act with absolute fidelity. * * * They cannot be permitted to serve two masters whose interests are antagonistic."

Spiegel v. Beacon Participations, 297 Mass. 398 at 410.

See also the following cases:

Corry v. Barre Granite Co., 91 Vermont 413 (Shareholders);
Timber Lands Assn. v. Neace, 92 W. Va. 196 (Directors and shareholders);
Keenan v. Eshelman, 120 A. L. R. (Del.) 227 (Directors); 2 At. (2nd) 904;

Miner v. Belle Isle Ice Co., 93 Mich. 97 (Directors and Shareholders);

Sacajawea Co. v. Skookum Lbr. Co., 116 Wash. 75 (Directors);

North Confidence Co. v. Fitch, 208 P. 328 (Attorney);

Marcuse v. Broad-Grace Corpn., 101 A. L. R. (Va.) 217, 180 S. E. 327;

In re Webster Loose Leaf Co., 240 Fed. 779 (Attorney);

19 Corpus Juris Secundum, Corporations, §§ 749(c) and 805.

There is no question of the disastrous financial consequences incurred by Hydro upon the purchase of these investments. They cannot be justified as fair and reasonable. These investments were imposed upon Hydro through superior force of its parent companies, and Hydro is entitled to appropriate relief.

II.

On the measure of recovery the record is clear that Hydro's recoverable damages would aggregate $131,859,059.56. The settlement figure of $10,000,000 is only 7.5% of the prospective recovery and is wholly inadequate even if rescission be not secured. Under the cases cited and calculation contained at page 33 *supra*, Hydro would have been entitled to a net recovery of damages on the NEPA transaction in the amount of $98,341,804.69 including interest, and after allowance of all proper deductions in Paper Company's favor for salvage by way of interim income and present value of this investment at the accounting date.

On the water powers Hydro is entitled to recover as damages, Paper Company's profit in the amount of $13,315,899.39 together with interest thereon to the accounting date, six per cent in Massachusetts, calculated at $11,185,355.48 to date of December 31, 1945. Total damage recovery on the water powers thus becomes $24,501,254.87.

The settlement also required Hydro and its subsidiaries to give Paper Companies release of certain Canadian profits (R. 337) as realized by Paper Companies' Canadian subsidiaries on the sale of assets to Hydro's Canadian subsidiary Gatineau. These profits comprised the following as shown at R. 293:

Profit on the April, 1931 sale.....	$3,600,000
Profit on sale of 1491 shares, Eddy Company	1,300,000
Total Canadian profits.....	$4,900,000
Interest on the above from Dec. 31, 1941 to Dec. 31, 1945 at 6% is.....	4,116,000
or a total of.....	$9,016,000

on the Canadian transactions.

Thus the grand total of liability which the settlement compromised, calculates as follows:

On the NEPA investment.....	$ 98,341,804.69
On the 1932 water powers.....	24,501,254.87
On the Canadian transactions.....	9,016,000.00
Total,	$131,859,059.56

The percentage of settlement to indicated full recovery is less than 7.5%—clearly inadequate as shown by such decisions as

Cohen v. Young, 127 Fed. (2d) (C. C. A. 6) 721 at 726.

III.

Paper Companies' defenses as disclosed in its answer in the Brickley case, and the previous derivative case are not substantial.

(1) On the contest of personal jurisdiction of the Massachuetts courts over the Paper Company, it has already been decided in both the Brickley case in Massachusetts State Court and in the Ladd case in the Federal District Court, that Paper Company was amenable to process in Massachusetts (R. 358, and 48-59).

Present Paper Company had been admitted to transact business in Massachusetts as a foreign corporation and had appointed the Commissioner of Corporations, its agent for the service of process. On May 18, 1943 the Paper Company sought to file with said Commissioner a purported revocation of the Commissioner's appointment, and then sold its Massachusetts plant to a subsidiary, thereafter continuing transaction of an interstate business only within Massachusetts.

The original appointment by the Paper Company of the Massachusetts Commissioner of Corporations as statutory agent was made under provision of Mass. G. L. chap. 181, providing for the appointment of such agent,

> "upon whom all lawful processes in any action or proceeding against it may be served * * * (which appointment) shall continue in force so long as any liability remains outstanding against the corporation in this commonwealth."
>
> *Ann. Laws Mass.*, Vol. 6, ch. 181, sec. 3, p. 61.

Under this statute foreign corporations were suable in Massachusetts on all types of claims whether arising *inside or outside* the territorial limits of the state.

Johnston v. Trade Ins. Co., 132 Mass. 432;
Trojan Corp. v. Green Mountain Power Co., 293 Mass. 377;
Canadian Pac. R. Co. v. Sullivan, 126 Fed. (2d) (C. C. A. 1) 433.

Hydro's claim in this case against Paper Company had been a claim outstanding in Massachusetts against the Paper Company prior to May 18, 1943. Hydro was a resident of Massachusetts as a voluntary trust association, title to whose assets was held by Old Colony Trust Company, a Massachusetts corporation (R. 60). Hydro's claim was thus outstanding in Massachusetts prior to May 18, 1943.

London Guarantee & Acc. Co. v. Woelfle, 83 Fed. (2d) (C. C. A. 8) 325 at 329.

The Court of Appeals in the present case indicated at R. 1729 that Federal Supreme Court decisions might impose a limit upon the scope of State Court jurisdiction against a foreign corporation under the circumstances here involved, citing *Hunter v. Mutual Reserve Life Ins. Co.*, 218 U. S. 573.

But this Hunter case involved a situation under the statute of North Carolina where the court of that state had limited the power of attorney as applicable only to causes of action arising within North Carolina. In the Federal opinion, the court expressly distinguished the Massachusetts statute and cases, such as *Johnston v. Trade Ins. Co.*, 132 Mass 432, *supra*. See federal opinion at page 588.

Furthermore, all the causes of action in the present case under the record showing, arose within the State of Massachusetts where Hydro had its office and where the transactions in controversy were consummated (R. 620, 1311, 1313).

(2) On the question of laches and limitation, the Massachusetts decision in *Old Dominion Copper Co. v. Bigelow*, 203 Mass. 159 at 201, clearly establishes that limitations and laches do not begin to run against a plaintiff in Hydro's position until after the time when the defendant parent corporation surrenders control of the plaintiff.

See also:

Whitten v. Dabney, 171 Cal. 621, and like cases.

In the instant situation Paper Companies did not surrender their control probably until June 16, 1941, and it is clear that such control was not surrendered earlier than January 31, 1939 when Paper Companies transferred their Class B and common Hydro shares carrying voting control to Paper Companies' trustees (R. 1029, 1030). All the several suits which were compromised by this settlement were commenced within six years following January 31, 1939.

Also in Massachusetts the rule is clear that the statute of limitations and laches do not start to run in the favor of a fiduciary such as Paper Company in the present case, until the beneficiary discovers the existence of its cause of action. In Massachusetts the fiduciary owes the duty of disclosure, so that continued silence in violation of that duty amounts to fraudulent concealment.

Connelly v. Bartlett, 286 Mass. 311 at 318;
Atlantic Natl. Bank v. Harris, 118 Mass. 147;
Old Dominion Copper Co. v. Bigelow, 203 Mass. 159 at 201.

In the present case the Court of Appeals indicated that the existence of the Federal Trade Commission Report might possibly charge Hydro and its shareholders with knowledge of its contents (R. 1732). But the Sixth Circuit

Court of Appeals in a previous decision in this general controversy, held that Hydro stockholders were not charged with notice of the contents of this report until the same had been actually brought to their attention.

Todd v. S. E. C., 137 Fed. (2d) (C. C. A. 6) 475 at 479.

(3) Also the defense of ratification is insubstantial. Under Massachusetts law a majority of stockholders cannot ratify transactions such as these.

Von Arnim v. American Tube Works, 188 Mass. 515, 518.

Brewer v. Boston Theatre, 104 Mass. 378 at 395.

See also:

Keenan v. Eshelman, 120 A. L. R. (Del. Sup.) 227, 2 A. (2d) 904.

The defense of ratification in the present case is rested only on a majority stockholder vote (P. 566), upon an occasion when the majority stock voted, comprised stock belonging to Paper Companies, which Paper Companies' own proxies voted in the meeting (R. 1030).

(4) Paper Company also cited in defense, a provision in the trust indenture creating Hydro, eliminating the existence of any fiduciary relation on the part of stockholders in their dealings with Hydro (R. 566).

In the Massachusetts decision of *Peterson v. Hopson*, 306 Mass. 597 at 610, such a defense was overruled.

Furthermore, this exculpatory provision was included in the trust indenture by virtue of the authorship of Paper Companies themselves without notice to Hydro stockholders. Defendant admitted authorship by its admission,

"that IP&P caused the Declaration of Trust of IHES (Hydro) dated March 25, 1929 * * * to be executed" (R. 548).

Also the courts do not enforce exculpatory clauses of this type to create immunity on the part of the trustee from acts of gross negligence or acts done in bad faith.

Browning v. Fidelity Trust Co., 250 Fed. (C. C. A. 3) 321 at 325.

And lastly, this exculpatory clause operated only to remove a fiduciary duty from Hydro stockholders in their mere capacity as stockholders. It did not remove any immunity resulting from stockholders' self-dealing with the corporate assets. In this respect the situation is no different from the case of corporate stockholders who do not, as such, carry a fiduciary status but are nevertheless charged with the fiduciary status if they undertake to engage in self-dealing with the corporate assets.

Mairs v. Madden, 307 Mass. 378 at 380;
Flint v. Codman, 247 Mass. 463, 472;
Lee v. Fiske, 222 Mass. 424;
Robotham v. Prudential Ins. Co., 64 N. J. Eq. 673 at 689;
Lebold v. Inland S. S. Co., 82 Fed. (2d) (C. C. A. 7) 351 at 353-4;
Southern Pac. Co. v. Bogert, 250 U. S. 483 at 492.

(5) Another defense of the Paper Company was the fact that the NEPA stock was largely purchased by Hydro at a time when Paper Companies were the only stockholders of Hydro. *Hayes v. The Georgian*, 280 Mass. 10 was cited in support of the defense. But this case is inapplicable to the present situation inasmuch as the whole plan of Hydro's creation indicated the intent on the part of the promoters to make a public sale of Hydro's securities, then

and in the future, on the basis of which Hydro would sell its own shares direct to the public, in addition to any shares sold originally to the Paper Companies. The case thus comes within the ruling of *Old Dominion Co. v. Bigelow*, 203 Mass. 159, where the Court said:

> "A review of the authorities seems to demonstrate that there is a liability of the promoter to the corporation *when further original subscribers to capital stock contemplated as an essential part of the scheme of the promoters*, came in after the transaction complained of, even though that transaction is known to all the then stockholders, that is to say, to the promoters and their representatives."
>
> *Old Dominion Co. v. Bigelow*, 203 Mass. 159 at 178 *et seq.*

See also:

> *Hollander v. Breeze Corp.*, 26 A. (2d) (N. J. Ch.) 507 at 514; aff. 26 A. (2d) (N. J. Ct. Err. and App.) 522.

As this Court will be informed in more adequate detail, in the final briefs to be filed after certiorari herein is granted, the record in the present case is replete with evidence that this public sale by Hydro of its securities direct to the public, was originally contemplated as part of the initial promotion scheme (R. 610, 611, 1421, 1433, 276, 277, 280, 777, 1582—Unprinted Ex. 3A sub. Ex. B and C, pp. 5-7).

The Court of Appeals in this case did not undertake to look into the facts and thus satisfy itself as to the inapplicability of the Hayes-Georgian decision. Instead it expressed an unanalyzed doubt as to whether the defense could be overcome and thus justified, *inter alia* the acceptance of the settlement. But had the Court examined the

facts as clearly shown in the record, no doubt on the point would have existed whatever.

(6) In general all these defenses aside from personal jurisdiction over defendant, comprise the typical defenses that have been raised and discredited over the years in cases of this type. All of them have been generally rejected, and a careful examination by the Court of Appeals in this case under the record facts would have resulted in similar rejection here.

As just one more example of the misunderstanding of the Court of Appeals, that Court stated at R. 1732:

> "The appellants tell us that Paper Company's domination of Hydro's board did not cease until 1939 and that the actions are well within the six year period after that. On the other hand, the Paper Company says there is no basis for contending that some of the directors (notably Mr. Arthur E. Childs and Mr. J. Howard Leman) have ever had any disqualification. They have been members of Hydro's board since early in the year of 1931. As a matter of fact Mr. Childs had objected originally to the purchase of the water properties and was largely responsible for the bargaining done regarding this purchase. Knowledge of all the directors of misconduct which would justify a cause of action is surely not necessary in a case of this kind in order that those not dominated shall do their duty with regard to the rights of the security holders who are being imposed upon.
>
> We give no expression of our view on the question whether the actions were timely brought. We do agree with the Trustee that the question is not a clear nor easy one" (R. 1732, Vol. 5).

This quotation implies that participation in Hydro corporate actions by directors Childs and Leman, not shown to be disqualified, is effective either to validate such

action, or at least to fix a date commensurate with these directors' then knowledge of the facts, as to when the statute of limitations and laches commenced to operate.

These implications and conclusions thereon are wholly erroneous.

Thus, the following is stated in a recent decision by the Federal Second Circuit Court of Appeals:

> "Appellant next contends that the issue of the directors' breach of their fiduciary obligation was met by the fact that the contract was expressly made subject to the approval of an independent director, Rooney. Rooney was not at the meeting, but was then elected to fill a vacancy. He had no direct interest in appellant, and was at the time acting as attorney for First Trust Company of Albany, holder of the third mortgage on the hotel property. This claim is obviously without merit. *Rooney could not have bound the debtor without the other directors, and it was their initiative and approval which constituted an essential part of the transaction. It is their fiduciary obligation which the District Court properly scrutinized.*"
>
> *United Hotels v. Mealey,* 147 Fed. (2d) (C. C. A. 2) 816 at 819.

And on the phase of the knowledge of the independent directors, which might start the limitation or laches period, the Massachusetts law is clear that so long as Hydro remained in control of a board of directors elected by the Paper Company, the running of this period would not commence.

> "So long as the plaintiff was wholly in the power of the defendant, it could not be charged with knowledge. Mere lapse of time is no bar to relief under these circumstances. Nor is the statute of limitations a bar."

Old Dominion Copper Co. v. Bigelow, 203 Mass. 159 at 201.

The California case of *Whitten v. Dabney* contains an analysis of this last cited principle pointing out its corollary, that laches on the part of one stockholder or director cannot bind another, viz:

> "A stockholder who institutes it sues purely as a trustee to redress corporate injuries. He has the unquestioned right to sue, but it is in no sense his duty to sue. An individual stockholder may be put upon notice that his corporation has been defrauded. Indeed, complete disclosure of these facts may be made to him. He gives consideration to the time, trouble, and expense of the litigation and the loss in which he would be involved if he failed to prevail, and decides that he will not begin the suit. Some years afterwards another stockholder for the first time gains knowledge of these same facts and institutes the action. It is susceptible of demonstration that the first stockholder knew of all these matters, and that as to him this right of action may be barred. Is this also a bar to the prosecution of the same action by another stockholder who has acted promptly upon learning of the fraud? Clearly this cannot be so. So long as the corporation itself remains under disability and is powerless to act by virtue of the fact that its control is in the hands of a board of directors accused of participation in the frauds, the statute of limitations does not run against it."

Whitten v. Dabney, 171 Cal. 621.

To the same effect is the New Jersey decision in *Endicott v. Marvel,* 81 N.J. Eq. 378, affirmed 83 N.J. Eq. 632.

IV.

Neither the District Court nor the Court of Appeals undertook to make any analysis of the merits of Hydro's cause of action nor of the defenses thereto. Particularly, the District Court failed to support its decision by

> "findings in such detail and exactness as the nature of the case permits, *of subisidiary facts on which the ultimate conclusion of fairness* (of settlement) *can rationally be predicated.*"
>
> *Kelley v. Everglades District,* 319 U.S. 415 at 420.

Absent such findings of fact and conclusions of law, it was the duty of the Court of Appeals either to reverse the case and remand to District Court for findings and conclusions, or in the alternative to make its own considered decision upon the record as a whole, without any presumptions of special weight attaching to discretionary rulings on the part of the court below.

The duty of the District Court to file findings of fact and conclusions of law is prescribed by Rule 52(a) of Rules of Civil Procedure, which provides:

> "(a) In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."
>
> *Rule 52(a),* 28 U. S. C. A., secs. 721-723, West Publn. Edn. p. 677.

However, the Court of Appeals at R. 1735, 1736 held the present matter, and presumably all decisions of the District Courts in holding Company act enforcement cases, do not constitute trials on issues of fact. Rather that the practice in such cases is governed exclusively by Rule 66 of the Civil Procedure Rules, prescribing that

practice in the administration of estates by receivers and by other similar officers appointed by the court, shall be in accordance with the practice *heretofore* followed in the courts of the United States, etc.

Rule 66, 28 U. S. C. A., secs. 721-723, West Publn. Edn. p. 740.

In the petition proper for certiorari herein, we have cited the rules and cases indicating that findings of fact and conclusions of law were required in this case.

Even though this controversy is a receivership matter, findings, etc., in receivership cases, were required prior to the adoption of the Rules of Civil Procedure. We also directed the attention of the Court to the reason for such findings, in order that the appellate courts should have a clear understanding of decisions under review. Particularly the appellate courts needed to know whether such decisions were based on the lower court's view on determinative questions of law, reviewable on appeal, or otherwise, upon a permissible discretion in relation to a matter of fact or expediency.

See *Sparks v. Mellwood Dairy,* 74 Fed. (2d) (C. C. A. 6) 695 at 696, where the point is made that the reviewing court is entitled to know

> "whether the (lower) court acted upon its view of a determinative question of law, reviewable upon appeal, or (otherwise) upon a permissible discretion in relation to a matter of fact or expediency."

In the present case the lower court's decision does not show its basis, whether resting upon a question of law or matter of discretion. But the Court of Appeals treated the decision as one of discretion and assigned as reason for affirmance, the fact that no abuse of discretion had been shown (R. 1735).

But such affirmance in light of the present record, is wholly erroneous. Appellants before the Court of Appeals, and petitioners here, were and are entitled to a record of findings and conclusions by the District Court *which would indicate the basis of decision.* Absent such findings by the District Court, the Court of Appeals was not warranted in affirming, except as the latter court made its independent review of the record and analysis of the case. The appellate court was not warranted in reviewing on the limited scope for abused discretion only, as there were nowhere contained in the lower court's decree any discretionary findings upon any subsidiary fact or issue.

Knapp v. Imperial Oil Co., 130 Fed. (2d) (C. C. A. 4) 1 at pp. 3 and 4.

See also the following cases indicating the duty of the Court of Appeals to reverse and remand for findings and conclusions, viz:

Mayo v. Lakeland Co., 309 U. S. 310, 84 L. Ed. 774;

Railroad Commission v. Maxcy, 281 U. S. 82, 74 L. Ed. 717;

Panama Mail SS. Co. v. Vargas, 281 U. S. 670, 74 L. Ed. 1105;

Siano v. Helvering, 79 Fed.(2d) (C. C. A. 3). 444;

Bowles v. Russell Packing Co., 140 Fed. (2d) (C. C. A. 7), 354;

Edwards v. Holland Banking Co., 75 Fed. (2d) (C. C. A. 8), 713;

Humphrey v. Helgerson, 78 Fed. (2d) (C. C. A. 8), 484;

Woodruff v. Heiser, 150 Fed. (2d) (C. C. A. 10), 869;

Bach v. Friden Co., 148 Fed. (2d) (C. C. A. 6), 407.

And see also the following cases which hold that the Court of Appeals in the alternative instead of remanding for findings, etc., had the right to examine the record ab initio.

Knapp v. Imperial Oil Products, 130 Fed. (2d) (C. C. A. 4), 1;

Sbicca-Del-Mac v. Milius, 145 Fed. (2d) (C. C. A. 8), 389;

Lemm v. Northern California Bank, 93 Fed. (2d) (I. C. C. A. 9), 709).

And the fact is obvious that if the Court of Appeals in the present case had undertaken the alternative course, of examining the record for itself ab initio, it was bound itself to make the equivalent of the findings, etc., which the lower court should have made. Otherwise appellants are forever deprived of the findings of subsidiary controlling facts. And right now in this case, we do not have any fair or adequate appraisal whatever by either of the lower courts of the various points on which this settlement actually depends.

CONCLUSION

Wherefore it is respectfully submitted that writ of certiorari in this case should be granted.

HOWELL VAN AUKEN,
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Osmond Y. Ladd and
Paul H. Todd.
1603 Ford Building,
Detroit 26, Michigan.

APPENDIX

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

OCTOBER TERM, 1946.

No. 4167.

OSMOND Y. LADD, ET AL.,
APPELLANTS,
v.
BARTHOLOMEW A. BRICKLEY, TRUSTEE, ET AL.,
APPELLEES.

CONSOLIDATED APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BEFORE MAHONEY, GOODRICH AND WOODBURY, JJ.

Howell Van Auken for appellants.

B. A. Brickley and *Frank B. Wallis*, with whom *Samuel Hoar* and *Edward R. Langenbach* were on brief for B. A. Brickley, Trustee, appellee; *Morton E. Yohalem*, Counsel Public Utilities Division, with whom *Roger S. Foster*, Solicitor *Robert S. Rubin*, Assistant Solicitor, *Alexander Cohen*, Attorney and *Robert F. Krause*, Public Utilities Division, were on brief for Securities and Exchange Commission, appellee; *John L. Hall*, with whom *John W. Davis, Richard Wait, Ralph M. Carson, Choate, Hall & Stewart, and Davis, Polk, Wardwell, Sunderland & Kiendl* were on brief for International Paper Company, appellee; *Joseph Nemerov* for Ethel Kresberg et al., appellees; and *Archibald Palmer, Friedman, Atherton, King & Turner*, and *Bennett E. Aron* on brief for Mildred Howard, appellee.

OPINION OF THE COURT.

November 14, 1946.

GOODRICH, J. This appeal from the judgment of the District Court for the District of Massachusetts brings before

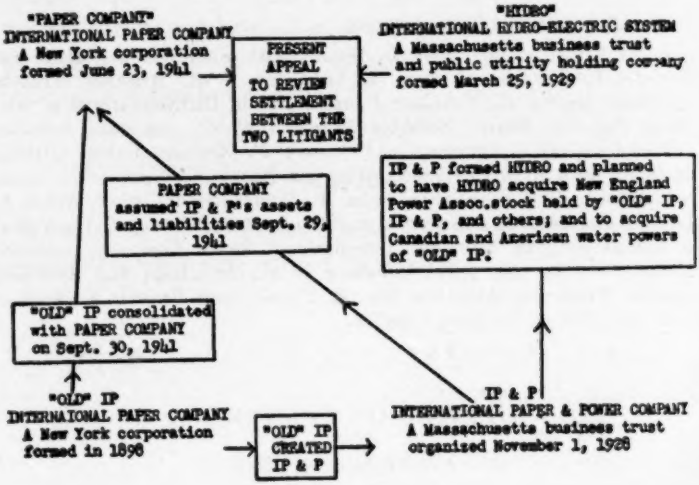
us the propriety of that court's approval of a settlement in an important matter of corporate reorganization.

The affairs of International Hydro-Electric System (hereinafter called Hydro) are involved. This company is a holding company and its reorganization under the Public Utility Holding Company Act of 1935[1] is in the District Court.

Hydro was formed by a predecessor of International Paper Company (hereinafter called Paper Company).[2] To simplify reference to the corporate relationships we shall speak of Paper Company as though it had been in continuous existence while the acts complained of arose. The legal significance of this assumption will be subjected to analysis later. A charge that International Paper Com-

[1] 49 Stat. 838 (1935), 15 U.S.C. Chap. 2C, § 79 (1940 Ed.).
[2] Diagram of Corporate Relations.

DIAGRAM OF CORPORATE RELATIONS


"PAPER COMPANY"
INTERNATIONAL PAPER COMPANY
A New York corporation
formed June 23, 1941
PRESENT APPEAL TO REVIEW SETTLEMENT BETWEEN THE TWO LITIGANTS
"HYDRO"
INTERNATIONAL HYDRO-ELECTRIC SYSTEM
A Massachusetts business trust and public utility holding company
formed March 25, 1929
PAPER COMPANY assumed IP & P's assets and liabilities Sept. 29, 1941
IP & P formed HYDRO and planned to have HYDRO acquire New England Power Assoc. stock held by "OLD" IP, IP & P, and others; and to acquire Canadian and American water powers of "OLD" IP.
"OLD" IP consolidated with PAPER COMPANY on Sept. 30, 1941
"OLD" IP
INTERNATIONAL PAPER COMPANY
A New York corporation
formed in 1898
"OLD" IP CREATED IP & P
IP & P
INTERNATIONAL PAPER & POWER COMPANY
A Massachusetts business trust
organized November 1, 1928
READ UP

pany had improperly manipulated Hydro to its own use and to the loss of Hydro's security holders was made with such force that the District Court appointed a member of the Massachusetts Bar, Bartholomew A. Brickley, Esq., to make an investigation. Subsequently, Mr. Brickley became Trustee in the reorganization proceedings. With the help of the Securities and Exchange Commission (hereinafter called S.E.C.) a thorough investigation was made. The conclusion reached by the Trustee was that enough facts had been uncovered to call for the institution of legal proceedings against the Paper Company. Suit was started in the Massachusetts State Court; also in the United States District Court for the District of Massachusetts. Before these actions came to trial on the merits, long negotiations were had between the parties looking to settlement. The Paper Company's original offer of $500,000 was, in the course of subsequent negotiations, eventually increased to $10,000,000 plus the agreement of Paper Company to lend one of Hyrdo's companies $3,000,000. This was subject to the provision that a clearing agreement be had with the Bureau of Internal Revenue with regard to Paper Company's income and excess profits tax liability for the money thus paid out. This clearance was subsequently obtained and the money paid into court. The District Judge has approved the settlement; so has the S.E.C. and the majority of those interested in the company. A group of junior security holders, however, are not satisfied with the amount obtained and bring this appeal alleging an error in the approval of the settlement above described. They figure that potential claims of the plaintiff in the actions total $131,859,059.56. They say that a settlement for only 7½% of this amount is not the kind of settlement which the court in the exercise of discretion can properly approve.

There are two main points on this appeal. The first one has to do with the form in which the District Court's con-

clusion appears. There were no formal findings of fact and conclusions of law. The decree recited: "That the court hereby determines that the compromise provided for in that certain agreement * * * between Bartholomew A. Brickley, solely as he is trustee of International Hyrdo Electro System * * * and International Paper Company * * * is for the best interests of the estate of said System, that the consideration payable thereunder to said System is fair, reasonable, and adequate and that adequate notice and opportunity to be heard has been given to all persons interested, and the court hereby approves said agreement * * *." It concluded with specific directions for the execution of the agreement.

The appellants say that this is insufficient. They prefer to have the Court of Appeals make its own findings of fact, but in lieu of that say the case must go back to the District Court for findings.

Aside from this argument on the procedural point, they say that the amount paid in settlement, although it may seem a lot of money to a judge, is so disproportionate to the amount which Hyrdo is entitled to recover against Paper Company that the approval of the settlement was an abuse of discretion on the part of the District Judge. This last argument is coupled with a group of minor arguments such as: The fact that the District Judge did not take as long to consider the case as the appellants now think he should have taken;[3] and the fact that according to the appellants the District Judge relied on the Master

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[3] Note, however, that on October 11, 1943, Judge Ford, of the United States District Court for the District of Massachusetts, appointed Mr. Brickley as special counsel for investigation of Hydro's claims against its parent companies; and on November 13, 1944, after receiving Mr. Brickley's report, Judge Ford appointed him as trustee of Hydro with orders to commence a lawsuit against the parent companies. Judge Ford had "lived with" this set of facts for over two years prior to authorizing an agreement to compromise.

and the S.E.C. recommendation instead of using his own head. We do not intend to take up these minor points individually because we think this whole litigation turns on the main question of whether it was within the discretion of the District Judge to approve the settlement proposed.

To this end we shall consider some of the points which both Paper Company and the Trustee have brought up as indicating the lines of defense which the Paper Company would have brought forward, had the actions brought by the Trustee against the Paper Company been pursued. We shall not, of course, commit ourselves to an answer on the merits of these defenses. It will be enough if it appears that they have the ring of reality about them. Nor will we labor the point, since its truth is obvious, that a defendant only has to make good on one defense to win a lawsuit.

General Considerations in Approval of Settlement

There are two or three circumstances not involved in the individual defense which should be mentioned. Before the Massachusetts actions were brought by Mr. Brickley there had been some legal advice on the question of Paper Company's liability to Hydro. This question had been raised by a security holder named Todd who had become a Director of Hydro sometime after the acts complained of had taken place. Two opinions were rendered. Each opinion advised against bringing an action on the basis that a successful recovery could not be reasonably anticipated. The opinions were signed, respectively, by the firm of Ropes, Gray, Best, Coolidge & Rugg and Robert G. Dodge, Esq. The authority carried by a document bearing the name of either of these signers is too well recognized to require elaboration in this opinion. Mr. Brickley had the benefit of seeing these memoranda. It was only after several months of investigation of the facts, assisted

by the S.E.C., the advantage of which the signers of these opinions did not have, that Mr. Brickley concluded and reported to the Court that he thought that discovered facts were sufficient to justify legal proceedings against Paper Company. The Trustee still thinks, however, and we agree, that the opinions thus rendered by eminent counsel to the effect that the establishment of liability was improbable may properly be considered as one of the elements on a very practical matter of the settlement of a disputed claim.

Another general element to be considered on the question of acceptability of a settlement is the attitude of the people who were financially interested in the affairs of the company. Hydro during its corporate life had issued securities which consisted of (1) debentures; (2) preferred stocks; (3) A stock; (4) B stock; and (5) common stock. Some of the preferred stock has been retired.[4] The B stock and the common stock were sold to Paper Company's parents in 1929 for $10,000,000 cash and over $19,000,000 of stock and assigned claims. This stock has been washed up in the financial reorganization, brought about by the S.E.C., and the entire issues of B and common stock were cancelled for the nominal consideration of $1.00.[5] Facts presented to the court reveal the following mathematical classification of the disapproving security holders:

1) 0.2% of the debenture holders (owning 9.3% of all debentures) disapprove.

2) 6% of the preferred stockholders (owning 29% of that stock) disapprove.

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[4] From May, 1930 to April, 1941, 144,799 shares of preferred stock had been issued. In August, 1930, Hydro repurchased 2,000 shares of the preferred stock issue.

[5] Trustees of Hydro executed cancellation order of the S.E.C. (8 SEC 485 (1941) on August 8, 1941.

3) 9% of the class A stockholders (owning 19% of that stock) disapprove.

These objections were registered by counsel and by reply postcards, that had been mailed along with a letter of protest of the settlement by Todd to all security holders, after Brickley had given official notice of the hearing for approval of the settlement. Todd held 31% of all the class A stock owned by the dissenting A stockholders. The overwhelming majority of the security holders in this enterprise either approve of, or at least do not disapprove of, the settlement.*

It is to be noted, also, that the vigorous opposition to the settlement comes from the holders of A stock, although there, too, the opposition comes from a minority of about 19% of the total number of shares. We do not know how well off the debenture holders will be if $10,000,000 is added to Hydro's assets. It is clear, of course, that they will benefit before the A stockholders do. It is equally clear that, to the extent that the A stockholders can embark the corporate enterprise on long and expensive litigation, they will have a run for other people's money, the result of which, if rosy hopes are realized, will be a profit to them. But the risk will be on the holders of the senior securities. This element, like the majority vote in favor of settlement, is not conclusive, but is one of the items which may be properly considered.

The third general point worth consideration is this: The staff of the S.E.C. has spent a very great deal of time in investigating the affairs of Hydro as part of its public

* This court directs attention to the fact that persons holding Hydro securities either had knowledge or means of knowledge of the examination of the financial structure of Hydro and attempts to improve its stability and usefulness. Various proceedings had been taking place before the S.E.C. ever since June 17, 1940 for this purpose.

function.[7] At the hearing before this Court the Commission unqualifiedly endorsed approval of the settlement. No court worth its salt will willingly make itself a rubber stamp for approving administrative Commission action. But the studied conclusion of an expert body which has made a prolonged investigation of a subject from the standpoint of the public interest is to be taken seriously. The affirmative recommendation of the Commission is therefore an element to be considered in assessing the wisdom of the settlement.

Points of Defense Alleged to Be Available to Paper Company

1. Is there Personal Jurisdiction over Defendant?

It will be remembered that the Trustee has started two lawsuits against Paper Company in Massachusetts, one in the State Court[8] and one in the Federal Court.[9] Paper Company says it is not in court in those actions. The Superior Court Judge in the state suit decided against Paper Company on this point, but evidently impressed with the importance of the question involved, reserved the case for report to the Massachusetts Supreme Judicial

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[7] As early as June 17, 1940, the S.E.C. had investigated Hydro's corporate structure and caused the cancellation of the class B and common stock, mentioned supra. Hearings were continued, and on July 21, 1942, the S.E.C. ordered Hydro to liquidate and dissolve. Todd contested this order. The order was upheld in *Todd v. Securities and Exchange Commission*, 139 F. (2d) 700 (C.C.A. 6, 1943). On August 12, 1943, S.E.C. instituted action, out of which this appeal grows, in the United States District Court because Hydro asserted that it could not comply with the S.E.C. order without assistance by the court.

[8] Commonwealth of Massachusetts Superior Court, in Equity No. 56916.

[9] District Court of the United States for the District of Massachusetts, Civil Action No. 3280.

Court. At this time there is no information regarding the report. The District Court, in the suit of Hydro against Paper Company withheld its decision pending a decision of the Massachusetts Supreme Judicial Court upon this problem of personal jurisdiction.

The question arises in this wise: Paper Company, subsequent to the 1929 and 1932 acts complained of by Hydro and prior to the running of the Statute of Limitations, was undoubtedly engaged in business in Massachusetts. Pursuant to a Massachusetts statute,[10] it designated an agent upon whom process in actions against it could be served. Before the lawsuits against it began Paper Company had withdrawn from local business in Massachusetts and revoked the authority of this agent.

Assume, for the moment, that Paper Company is no longer carrying on any activities in Massachusetts. Can it be held subject to suit in that State on a claim which arose before the authority of the agent to receive process was revoked?

It is settled that a state may make provision for suit in its courts against a foreign corporation which once did business there, but which has now ceased to do so.[11] This statement of power of a state, however, is usually, perhaps always, coupled with the proviso that the claim

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[10] Mass. G. L. (Ter. Ed.) c. 181, § 3. "Commissioner to be appointed attorney for service of process. Every foreign corporation, which has a usual place of business in this commonwealth, *** shall before doing business in this commonwealth, in writing appoint the commissioner and his successor in office to be its true and lawful attorney upon whom all lawful processes in any action or proceeding against it may be served, and in such writing shall agree that any lawful process against it which is served on said attorney shall be of the same legal force and validity as if served on the corporation, and that the authority shall continue in force so long as any liability remains outstanding against the corporation in this commonwealth.* * *"

[11] *Washington v. Superior Court*, 289 U.S. 361 (1933).

sought to be sued on arose out of the business done by the corporation in that state.[12] Can a state subject a corporation to suit after it has ceased to do business in a state for a claim not arising out of the business done there? In the first instance the answer to such a question is a matter of local law, here Massachusetts. If Massachusetts says that its statute does not cover such a set of facts the corporation does not need to invoke anything more than the statute and the Massachusetts court's interpretation thereof to hold it not amenable to such a suit in that State. There is Massachusetts authority which looks in that direction with regard to the set of facts similar to those involved here.[13] The matter is not, however, one finally to be determined by Massachusetts law. There is the further question of what limitations the United States Supreme Court will impose to limit the scope of state court action against a foreign corporation under the circumstances here involved. And, here, there is authority from that Court which gives support to a limitation of the state's power to suits on claims arising out of the business which was done by the corporation in the state in question.[14]

Did these claims by Hydro against Paper Company arise out of the Paper Company's activity in Massachusetts? That is, at least in part, a question of fact and we have had no trial on the facts. Hydro started its life as a Massachusetts business trust. Therefore, perhaps one can say that any loss suffered by the business entity, as distinguished from the loss of individual security holders, was suffered there. But the inter-relations of

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[12] Restatement, Conflict of Laws (1934) § 93; Restatement, Judgments (1942) § 30, comment d.

[13] See *Tucker v. Columbian National Life Ins. Co.*, 232 Mass. 224, 228, 122 N.E. 285, 286 (1919).

[14] *Hunter v. Mutual Reserve Life Ins. Co.*, 218 U.S. 573 (1910).

Hydro and the Paper Company were not confined to Massachusetts transactions. Indeed the properties which Hydro complains that Paper Company sold to it at inflated values were scattered around through New England and down into New York. It is a very difficult question to try to decide whether Hydros complaint is based on transactions arising out of the Paper Companys Massachusetts activities.

Paper Company has ceased to do local business in Massachusetts. It does have representatives there who solicit offers from Massachusetts prospects looking to transactions which are completed by the shipment of goods in interstate commerce. The Massachusetts court has said that such solicitations is not such doing of business in Massachusetts as to make a foreign corporation subject to suit there.[15] We now know that systematic canvassing by travelling salesmen who solicit offers for inter-state sales can constitutionally subject the employing company to liability for a state's unemployment compensation fund.[16] That is not the same thing as saying that a lawsuit may be pursued against the foreign corporation under the same set of facts. But here the fact that the state court has ruled that such solicitation does not constitute doing business on which to found suit settles the question adversely to the plaintiff and the foreign corporation seeking to evade litigation in that state does not need to try out the question of its constitutional protection against such litigation.[17] It looks, therefore, as though

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[15] *Thurman v. Chicago, Milwaukee & St. Paul Ry. Co.*, 254 Mass. 569, 151 N.E. 63 (1926).

[16] *International Shoe Company v. State of Washington*, 326 U.S. 310 (1945).

[17] *Thurman v. Chicago, Milwaukee & St. Paul Ry. Co.*, 254 Mass. 569, 151 N.E. 63 (1926); *Reynolds v. Missouri, Kansas & Texas Railway*, 224 Mass. 379, 113 N.E. 413 (1916).

the current activities of Paper Company in Massachusetts form no basis for holding it amenable to suit in Massachusetts courts. The significance of its past activities has already been discussed above.

Another method of approach to this complicated problem may be had in tracing the corporate history of present defendant. It was set up as a New York corporation by a combination of a New York corporation and a Massachusetts business trust. The new corporation, Paper Company, present defendant, assumed liabilities of its parents. It is arguable and it has been argued here, that this assmption of liability was a New York act and not a doing of business in Massachusetts at all. If that argument should be accepted the support for Massachusetts jurisdiction against a child of that union, that is the present Paper Company, become thinner and thinner. We are not inclined to accept the correctness of this agrument without exceedingly careful consideration. We mention it, however, as an additional factor which we, or any court, would have to treat and dispose of before final disposition could be made on the question of whether Paper Company is subject to suit in Massachusetts for the claims involved.

The conclusion to be drawn from this perhaps too detailed discussion of the jurisdictional point is that it is full of interesting and difficult legal questions. Any one of them would make a good moot court case and the decision of any one by a court might be made the subject of a legal essay and rate a paragraph in a learned treatise. But since the function of the Trustee here is not to enrich the literature of the law, but to use his best efforts in getting as much as he reasonably can for the benefit of Hydro, it is clear to us that the difficulties involved in the jurisdictional point are very strong factors

to be considered in the practicability of the terms of the settlement.

2. Are the Actions Barred?

Paper Company contends very vigorously that they are. The Trustee says that there is no certainty that they are not. The appellants necessarily take the position that the actions are timely.

The Massachusetts Statute of Limitations applicable in both law and equity is six years. There is another section which provides that where one "* * * fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action".[18]

The acts complained of by Hydro against Paper Company began in 1929 and ended in 1932 with the acquisition of certain properties located in Maine, New Hampshire and New York (hereinafter called New York properties). The lawsuits begun by the Trustee were started in 1943. It is obvious that the action will be barred unless it can be brought under the concealment exception to the running of the statute. It is also clear now that the plaintiff will have no advantage on this aspect of his case in the federal court over what he has in the state court. Since these suits were begun the Supreme Court has decided the important case of *York v. Guaranty Trust Co.*, 326 U.S. 99 (1945), which is conclusive authority for the statement just made.

Were the lawsuits in question to be tried, the points coming up under the statute would, therefore, have to

[18] Mass. G. L. (Ter. Ed.) c. 260, § 12.

do with whether factually and legally plaintiff's case can be brought under the fraudulent concealment exception. In this connection it is to be noted that there was a Federal Trade investigation of Hydro in 1931 and that report has been available since 1931. Are all shareholders, and especially the directors, charged with the information contained in this public document which concerns their company? The appellants tell us that Paper Company's domination of Hydro's board did not cease until 1939 and that the actions are well within the six year period after that. On the other hand, the Paper Company says there is no basis for contending that some of the directors (notably Mr. Arthur E. Childs and Mr. J. Howard Leman) have ever had any disqualification. They have been members of Hydro's board since early in the year of 1931. As a matter of fact Mr. Childs had objected originally to the purchase of the water properties and was largely responsible for the bargaining done regarding this purchase. Knowledge of all the directors of misconduct which would justify a cause of action is surely not necessary in a case of this kind in order that those not dominated shall do their duty with regard to the rights of the security holders who are being imposed upon.

We give no expression of our view on the question whether the actions were timely brought. We do agree with the Trustee that the question is not a clear nor easy one. The uncertainties residing in it were clearly suffcient to be a relevant and important element in determining the advisability of settlement.

2. The Question of Promoter's Profits.

This question is concerned with the 1929 acquisition by Hydro from Paper Company of an interest in the New England Power Association securities. Paper Company created Hydro and sold it these securities. Paper Com-

pany advanced money to Hydro and took back obligations issued by Hydro. Out of this transaction it is charged that Paper Company made an inordinate profit at the expense of Hydro's security holders. It is to be noted that the argument regarding this point does not touch the 1932 transactions as to New York properties. It does, however, affect the New England Power Association stock transaction which was the largest item in the list of complaints which Hydro makes against Paper Company.[19] To the extent that a claim based on this New England transaction is subject to defense or a scaling down of damages claimed, the amount involved in the settlement comes closer to being the actual amount which could have been recovered in favorable litigation.

Appellants naturally stress *Old Dominion Copper Co. v. Bigelow*[20] to furnish the rule which they say applies where promoters mulct the corporation promoted for their own benefit and to the cost of the security holders. To the extent that Massachusetts law controls, the Bigelow case would, of course, be applicable both to the suit in the Massachusetts court and the United States court. But both the Trustee and Paper Company stress the limiting Massachusetts decision of *Hayes v. The Georgian, Inc.*[21]

So in litigation the question before a court would be whether Paper Company is liable on the promoter's doctrine in the Bigelow case or whether this transaction between Paper Company and its creation, Hydro, was not just a matter of shifting of money and securities back and forth in the same corporate family and thus brought

[19] Appellants contend that the loss to Hydro by this purchase was $53,136,534.69, plus loss of income on said stock since 1934.

[20] 203 Mass. 159, 89 N.E. 193 (1909).

[21] 280 Mass. 10, 181 N.E. 765 (1932).

under the limitations of *Hayes v. The Georgian, Inc.* The appellants say that it is not so; that a public offering was contemplated, although they admit that the Georgian case is one that is to be taken very seriously in connection with this problem.

Here, again, we are not called upon to answer the question. All through these various arguments we are endeavoring to bear in mind the point that whatever facts were dug up in the Trustees' investigation were necessarily found ex parte. Mr. Brickley can report to the court what he thinks he could prove. But he has no way of knowing what countervailing facts could be brought out by the defendants when their side of the case is presented. So, here, if it could be established that the facts are not such as to bring the case under the doctrine of the Georgian case it might well be that the Bigelow decision could prevail in full force. But there can be no possible doubt that the question of which one of these doctrines is applicable is a highly important one with regard to the recovery concerning the New England transactions. We think the answer is doubtful and that doubtfulness is a proper element to take into consideration concerning the desirability of a proposed settlement.[22]

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[22] The Ropes, Gray, Best, Coolidge & Rugg Report, on p. 578 of the Transcript of Record, comments upon the difficulty of proving facts at a trial of this case as follows: "In this investigation we have had the advantage of examining many documents which ordinarily would not be available because compiled by the company against whom the court action would be had. These records were available only because International Paper was formerly the parent of IHES [Hydro], and duplicates were supplied to IHES of important papers of International Paper. It should be noted, however, that much of this material might well be inadmissible as evidence should this case come to trial."

Conclusion After Application of Available Defenses to the Settlement Question.

The briefs and argument in this case have not only covered the questions discussed above, but some others as well. For instance, there is the problem of possible ratification of the transactions. There is appeal to the "business judgment" rule. It is suggested that there are difficulties of great magnitude in connection with the valuations of the properties acquired by Hydro from the Paper Company. We do not think that either the interest of the parties or the interest of the public would be benefited by a further discussion of these points by this Court. What has been said above is sufficient to show that the questions involved in the litigation begun by the Trustee are hard and complicated both in facts to be proved and law to be applied. $10,000,000 does not look so large when it is set up against $131,000,000 by a skillful advocate. The Court still thinks that $10,000,000 is a great deal of money. The District Judge told the Trustee it was proper to take the bird in hand instead of a prospective flock in the bush. Our consideration of the case convinces us that there was no abouse of discretion in so deciding.

APPLICABILITY OF RULE 52(a).

The appellants argue that the District Court erred in failing to follow the mandate of Rule 52(a) of the Federal Rules of Civil Procedure. The applicable language is: "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment * * *"[23] We think there are at least two answers to appellants contention here.

I The first answer is that the court did find such facts as the nature of the case permitted. What was before the court? It was not the decision upon the facts or law involved in the two lawsuits brought by the Trustee, Mr. Brickley. It was the determination of whether or not in view of all the issues involved in those cases the settlement was for the best interests of the estate being administered under its direction. The court in its decree of December 26, 1945 found, inter alia, "That the court hereby determines that the compromise provided for * * * is for the best interests of the estate of said System [Hydro] that the consideration payable thereunder to said System is fair, reasonable, and adequate and that adequate notice an dopportunity to be heard has been given to all persons interested * * *." These are findings of fact. They are ultimate facts, truly, and represent a judgment based upon the consideration of all the imponderables involved in determining whether the proposed offer met the requirements of being fair, reasonable and adequate. We do not see just what more could be asked for. Certainly the court was not reuqired to put its guess as to the probable success of each claim and defense into a formally stated conclusion.

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[23] Fed. Rules Civ. Proc. § 52(a), 28 U.S.C.A. § 52(a) (1941).

The second answer is that we do not think Rule 52(a) is applicable to this case. It would have been applicable in the case brought in the District Court by the Trustee against Paper Company, had that case been litigated to a conclusion. But in the cause which is now before us the court was not trying issues on facts; it was administering an estate under the provisions of a federal statute, the Public Utility Holding Company Act of 1935. Mr. Brickley, as Trustee, was in a position similar to that of a receiver. The provision of the Federal Rules applicable to such situation is Rule 66,[24] not Rule 52(a).

Our conclusion is that there was no failure on the part of the court to comply with the provision of the Rules of Civil Procedure.

The judgment of the District Court is affirmed.

[24] Fed. Rules Civ. Proc. § 66, 28 U.S.C.A. § 66 (1941).